72-263 FILE COPY

SUPREME COURT, U. S.
FILED
AUG 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

....., 1972

No. 72-263

UNITED STATES OF AMERICA,
Respondent,

vs.

HILLIS B. AIKIN and JOHN W. MILLIGAN,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

PATTERSON, LORENTZEN, DUFFIELD,
TIMMONS, IRISH & BECKER
THEODORE T. DUFFIELD
ROY M. IRISH
729 Exchange Building
Des Moines, Iowa 50309

LAWYER, LAWYER & DUNN
MARTIN R. DUNN
427 Fleming Building
Des Moines, Iowa 50309

Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

a. The Court erred in refusing to dismiss the indictment for the reason that the same was returned on the basis of only hearsay testimony by a witness who did not testify or offer any evidence during the trial of this case 6

b. The Court erred in failing to order a new trial for the reason that these Defendants were deprived of their right to a fair trial in that the government in pretrial discovery proceedings represented that they would not call any expert witnesses, and in fact an expert witness on vital matters in the case was called by the government 7

c. The Court erred in failing to order a new trial because these Defendants were denied the right to a fair trial as the result of the United States of America representing that there were no exculpatory statements obtained during their investigation when in fact they had obtained some 7

Conclusion 8

Appendices—

A. Opinion of the United States Court of Appeals for the Eighth Circuit A-1

B. Constitutional provisions and statutes involved .. A-5

Cases Cited

Costello v. United States (1956), 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, Reh den, 35 U.S. 904, 100 L.Ed. 1440, 76 S. Ct. 692 6

Pierce v. United States, 414 F.2d 163 (U.S. App. 5th Cir. 1969) 7

United States v. Arcuri, 282 F.Supp. 347 (1968) .. 6

United States v. Beltram, 388 F.2d 449 (U.S. App. 2d Cir. 1968) 6

United States v. Bryant, 439 F.2d 642 (U.S. App. District of Columbia, Cir. 1971) 7

United States v. Farrington, F.Rptr. 347 6

United States v. Kelly, 420 F.2d 26 (U.S. App. 2d Cir. 1969) 7

United States v. Miller, 411 F.2d 825 (U.S. App. 2d Cir. 1969) 7

United States v. Payton, 363 F.2d 996 (U.S. App. 2d Cir. 1966) 6

United States v. Rubin, 218 F.Rptr. 248 6

IN THE

SUPREME COURT OF THE UNITED STATES

....., 1972

No. .....

UNITED STATES OF AMERICA,
Respondent,

vs.

HILLIS B. AIKIN and JOHN W. MILLIGAN,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on the 20th day of July, 1972. The Court of Appeals affirmed the District Court's judgment and ruling refusing to quash and set aside the indictment returned against these Defendants and refusing to grant these Defendants' request for a new trial after conviction and sentencing on the charges returned in the indictment.

OPINIONS BELOW

The United States District Court for the Southern District of Iowa did not render an opinion on this case. The opinion of the Court of Appeals for the Eighth Circuit filed July 20, 1972, (Appendix infra page A-1) has not been reported at the time of the printing of this petition.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on the 20th day of July, 1972, and a copy thereof is appended to this petition (Appendix infra page A-1). The jurisdiction of this Court is invoked under 20(a) U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Questions Presented Are:

I

The Court Erred in Refusing to Dismiss the Indictment for the Reason That Same Was Returned on the Basis of Only Hearsay Testimony by a Witness Who Did Not Testify or Offer Any Evidence During the Trial of This Case.

II

The Court Erred in Failing to Order a New Trial for the Reason That These Defendants Were Deprived of Their Right to a Fair Trial in That the Government in Pretrial Discovery Proceedings Represented That They Would Not Call Any Expert Witnesses, and in Fact an Expert Witness on Vital Matters in the Case Was Called by the Government.

III

The Court Erred in Failing to Order a New Trial Because These Defendants Were Denied the Right to a Fair Trial as the Result of the United States of America Representing That There Were No Exculpatory Statements Obtained During Their Investigation When in Fact They Had Obtained Some.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States is set forth in the Appendix, infra, page A-5.

STATEMENT OF THE CASE

I

The Defendants were tried and found guilty of violation of the mail fraud statute, 18 USCA §1341.

The Grand Jury returned the indictments against these Defendants based upon the testimony of only one witness who was the postal inspector. He did not appear as a witness in the actual trial of the case. The entire extent of this one witness's testimony consisted of hearsay evidence. The Grand Jury was deprived of an opportunity to question any of the witnesses that actually testified at trial. During the course of the trial the Defendants filed a motion for inspection of the Grand Jury minutes and this was denied by the Court on the basis that the Court was advised that no minutes were taken. These Defendants, therefore, have no knowledge or any way of knowing what was represented or told to the Grand Jury that resulted in the indictments.

II

Following the indictment, an omnibus hearing was ordered by the trial court. At the hearing the Defendants requested of the government whether or not there would be expert witnesses, the name of the witness, the qualifications, the subject matter of the testimony, and any reports. In response the government stated and represented that there would be no expert witnesses. There was no change in the report given by the government to these Defendants prior to commencement of the trial. The Defendants and their counsel were not advised at any time that the government would call an expert witness until they produced Robert Frank, as an expert witness during the actual trial. The Defendants did not and could not anticipate any expert witness testifying on behalf of the government and as a consequence no effort was made to produce testimony which would counteract the testimony of the expert. The Defendants requested the Court to strike all of the testimony of the expert witness and this was refused. The Defendants also requested the Court to sustain their motion for a new trial and this also was refused. The testimony of the expert witness dealt with vital issues of the charges against these Defendants. The expert testified at great length as it concerns the average price of chinchilla furs from approximately 1966 through 1970. He testified that the average price was very low, and in fact, much lower than contended by the Defendants. The price of chinchilla furs during this period of time was an essential allegation made by the government. In addition to the fur prices, the witness testified about the general marketing of furs. He testified they were always a hard item to sell because the supply was much greater than the demand. This was an issue that was highly contested between the parties. The witness also described the man-

ner and method of marketing chinchilla skins and related that they were sold by "private treaty method". This was described as a method of sale designed to keep the price of furs higher than what it would be if the ordinary forces of supply and demand were allowed to work in the market. Based upon the testimony of the expert witness the government argued to the jury that there was an oversupply and not a sufficient demand for chinchilla furs. This was directly contrary to the contention of these Defendants. In addition to the above, the expert witness testified that beige and silver mutation chinchillas had no real market value. Some of the other witnesses testified that they purchased this type of animal. If the Defendants had known this expert was going to testify along this line, they could have presented contrary evidence concerning the value of these animals. However, with the short notice they had, there was no opportunity to obtain contradicting expert testimony in order to rebut that of the government's witness.

III

Prior to trial, on two occasions, and also at the close of the government's case the Defendants filed motions for disclosure of names of persons interviewed who gave exculpatory information during the investigation conducted by the government. In each instance the Defendants were informed by the government that they were not in possession of any exculpatory information. This was contradicted by affidavits attached to the motion for new trial showing that witnesses interviewed by the government in fact did give exculpatory information prior to the commencement of the trial. The representations made by the government that no exculpatory information was available or had been obtained was contrary to the fact. The net result of the misleading representations made by the government deprived these Defendants of a fair trial.

REASONS FOR GRANTING THE WRIT

I

The manner and method that the government used in obtaining the indictments against these Defendants was contrary to the Fifth Amendment to the United States Constitution and the rights provided by that amendment. The language of the Fifth Amendment becomes meaningless if these Defendants are allowed to be indicted as a result of pure hearsay testimony from one individual with a particular interest in the case. The manner of obtaining the indictment also violated the purpose and intent expressed by this Court in **Costello v. United States** (1956), 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406. Reh den, 35 U.S. 904, 100 L.Ed. 1440, 76 S. Ct. 692. Particular reference is made to page 364 of 350 U.S. where Justice Burton wrote a concurring opinion.

The manner and method of obtaining the indictment is also contrary to the purpose and intent expressed in the case of **United States v. Farrington**, F.Rptr. 347 and also **United States v. Rubin**, 218 F.Rptr. 248.

Judge Medina in **United States v. Beltram**, 388 F.2d 449 (U.S. App. 2d Cir. 1968), expressed objection with great ability to the manner and method of obtaining the indictments.

What happened to these Defendants is also contrary to the law expressed in **United States v. Payton**, 363 F.2d 996 (U.S. App. 2d Cir. 1966) and **United States v. Arcuri**, 282 F.Supp. 347 (1968).

II

The failure of the government to disclose its expert witness also deprives these Defendants of a fair trial. The case of **United States v. Kelly**, 420 F.2d 26 (U.S. App. 2d Cir. 1969) established a duty on a part of the government to disclose certain information. This duty was violated by the government in the case against these Defendants.

The case of **Pierce v. United States**, 414 F.2d 163 (U.S. App. 5th Cir. 1969) also commented on the duty of the government to disclose certain information. The purpose and meaning of that case is violated when the government in this case refused to disclose the information requested. The case of **United States v. Miller**, 411 F.2d 825 (U.S. App. 2d Cir. 1969) also sets out a duty that we feel the government violated in this case.

III

The case of **United States v. Bryant**, 439 F.2d 642 (U.S. App. District of Columbia, Cir. 1971) establishes that due process of law requires a disclosure of certain evidence. The exculpatory statements that were in fact given to the government is encompassed by that evidence. The government had a duty and obligation to disclose it to the Defendants and failed to do so. In fact they made a representation contrary to the actual fact. This violated the Defendants right to a fair trial.

CONCLUSION

For the important reasons assigned it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

PATTERSON, LORENTZEN,
DUFFIELD, TIMMONS,
IRISH & BECKER

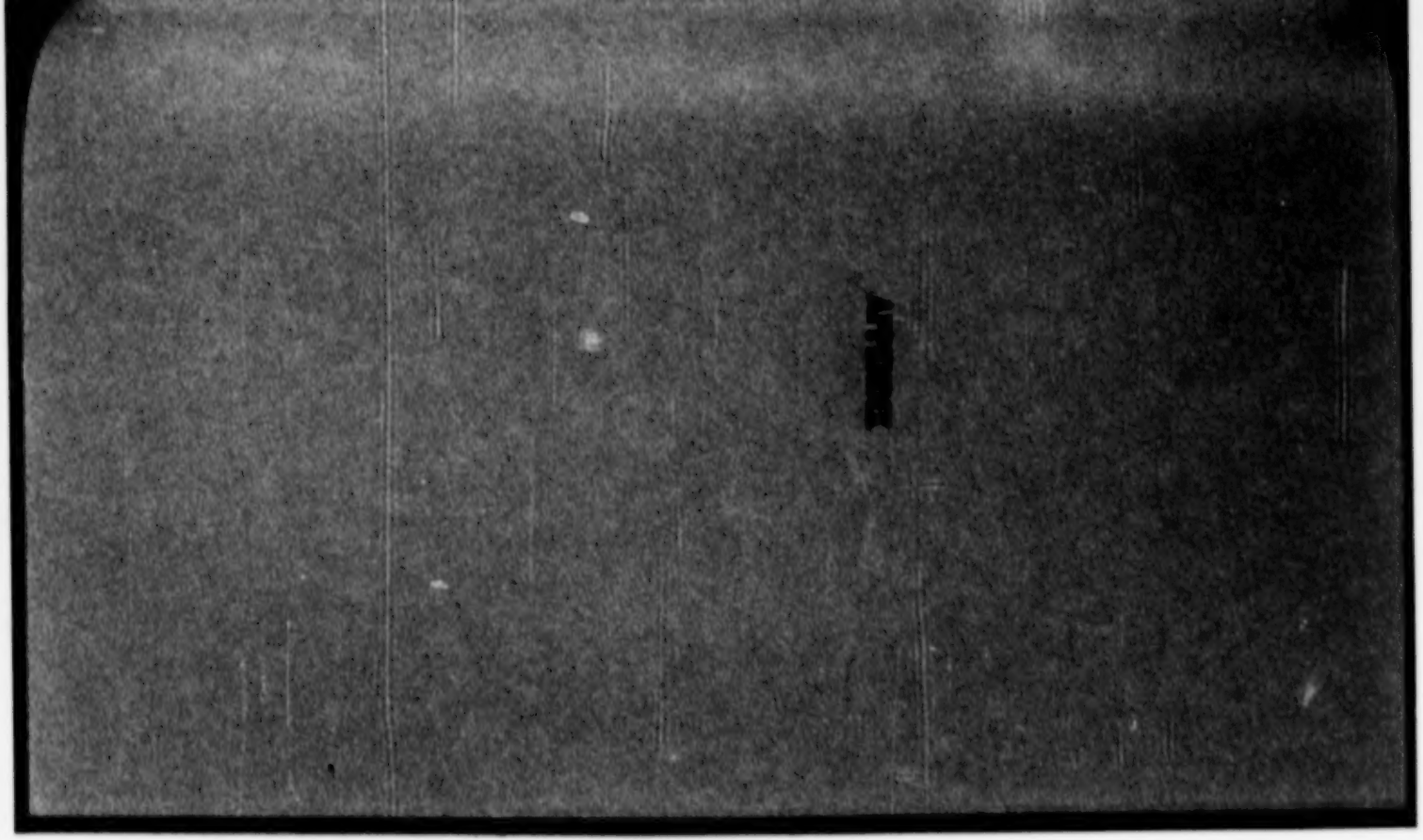
THEODORE T. DUFFIELD

ROY M. IRISH
729 Exchange Building
Des Moines, Iowa 50309
Phone: 283-2147

LAWYER, LAWYER & DUNN

MARTIN R. DUNN
427 Fleming Building
Des Moines, Iowa 50309
Phone: 288-2213

Attorneys for Petitioners



APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 71-1699.

United States of America, Appellee, v. Hillis B. Akin and John W. Milligan, Appellants.	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: June 14, 1972.

Filed: July 20, 1972.

Before Van Oosterhout and Murrah,* Senior Circuit Judges, and Heaney, Circuit Judge.

Per Curiam.

Akin and Milligan take this appeal from a jury verdict of guilty of violation of the mail fraud statute, 18 U.S. C.A., § 1341. Appellants were indicted on eighteen counts. Akin was found guilty on all eighteen counts and sentenced to five years imprisonment in each count, to be served concurrently, in addition to a $10,000.00 fine. Milli-

---

* Senior Circuit Judge, Tenth Circuit, sitting by designation.

gan was found guilty on Counts V through XVIII and sentenced to four years imprisonment on each count, to be served concurrently. The acts of fraud for which appellants were convicted arose from the sale and financing of live chinchilla breeding stock and equipment.

Appellants assert three grounds for reversal on appeal: (1) That the court erred in refusing to dismiss the indictment because it was based on hearsay testimony. (2) That the court erred in failing to order a new trial because the government introduced expert testimony contrary to its pretrial representation that no expert testimony would be introduced; and (3) that the court erred in failing to order a new trial because the government represented in pretrial proceedings that it was in possession of no exculpatory statements when in fact there were exculpatory statements in its possession.

On the authority hereinafter cited, we uphold the convictions and sentences of these appellants.

I

It is well-settled in this Circuit that an indictment can be based wholly on hearsay evidence. *Costello v. United States,* 350 U.S. 359; *Williams v. United States,* 8 Cir., 344 F.2d 264, 266; *Truchinski v. United States,* 8 Cir., 393 F.2d 627, 633; *United States v. Gross,* 8 Cir., 416 F.2d 1205, 1210. Therefore, there has been no infringement of appellants' Fifth Amendment right that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

II

The government at trial offered the testimony of Robert Frank, a fur broker, who qualified as an expert on the chinchilla market. At an omnibus pretrial discovery hear-

ing, the government represented that no expert testimony was anticipated. Appellants assert the government had a continuing duty to inform the defendants before trial that an expert would be introduced. Without passing upon the validity of the assertion, we find that appellants must fail in their request for a new trial. Sanctions for violation of Rule 16(g), Fed.R. Crim. P., are within the discretion of the trial judge. *Hansen v. United States*, 8 Cir., 393 F.2d 763, 769-770. Judge Hanson indicated to defendants that he would entertain a proper motion for continuance. Defendants failed to take advantage of the sanction offered and proceeded to cross-examine the witness. In the absence of abuse of discretion by the trial court, a defendant will not be heard to complain when he fails to avail himself of a proper remedy because he wanted more than offered.

III

In a post-trial motion for a new trial, appellants offered affidavits from a salesman employed by defendants and three satisfied customers of defendants. All four stated that they told government investigators favorable things as to the defendants. At pretrial the government represented that it had no exculpatory evidence in its possession. *Brady v. Maryland*, 373 U.S. 83, holds that "suppression of evidence favorable to an accused upon request violates due process where the evidence is material. . . ." 373 U.S. 83, 87.

The evidence asserted to have been suppressed here was not beyond the easy reach of the defendants; therefore, we find that no evidence was suppressed. There is nothing to indicate that defendants did not know or should not have known that these affiants were available for the defense. In fact, the evidence shows that defendants were

in contact with these affiants up to and during the proceedings below, and that evidence was presented at trial by these affiants.

Appellants were afforded a fair trial. The convictions stand affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Constitution of the United States

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-263

HILLIS B. AKIN AND JOHN W. MILLIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Tried before a jury in the United States District Court for the Southern District of Iowa on eighteen counts of mail fraud, 18 U.S.C. 1341, petitioner Akin was found guilty on all counts and petitioner Milligan on fourteen. Akin was sentenced to five years' imprisonment on each count, to run concurrently, and fined $10,000. Milligan was sentenced to four years' imprisonment on each count, to run concurrently. The

fraud involved the sale of live chinchilla breeding stock and equipment. The court of appeals affirmed (Pet. App. A).

Petitioners raise precisely the same contentions rejected below—namely, that the indictment was improperly based on hearsay evidence; that the government produced an expert witness at trial without previously disclosing that it intended to do so; and that the government failed to provide the defense with exculpatory evidence (the names of some of petitioners' customers who said they were satisfied). Each of these contentions is adequately answered by the court below on whose opinion we principally rely. In addition to the case cited by the court below in rejecting the argument that the government's failure to disclose its expert witness denied petitioners a fair trial, see also *United States* v. *Saitta*, 443 F. 2d 830, 831 (C.A. 5), certiorari denied, 404 U.S. 938; *Hemphill* v. *United States*, 392 F. 2d 45, 48 (C.A. 8), certiorari denied, 393 U.S. 877; *Meyer* v. *United States*, 396 F. 2d 279, 283 (C.A. 8), certiorari denied *sub nom. Dugger* v. *United States*, 393 U.S. 1017; *United States* v. *Cole*, 453 F. 2d 902 (C.A. 8). We further note that this Court denied certiorari in *Hansen*, 393 U.S. 833, cited by the court below (Pet. App. A-3).

We point out in addition that petitioners' reliance (Pet. 7) on *United States* v. *Bryant*, 439 F. 2d 642 (C.A. D.C.), is misplaced. In *Bryant* the court of appeals was concerned with the intentional non-preservation by investigative officials of tape recordings of

statements by the *defendants*. In that case, however, the court pointed out that Rule 16, Fed. R. Crim. P., does not authorize discovery or inspection of statements made by government witnesses or prospective witnesses (other than the defendant) except as provided by 18 U.S.C. 3500. 439 F. 2d at 649.

Nor is such a disclosure required by due process where, as here, the witnesses or prospective witnesses are known to both parties. *United States* v. *Gleason*, 265 F. Supp. 880, 884 (S.D. N.Y.); *Levin* v. *Katzenbach*, 363 F. 2d 287, 291, n. 11 (C.A. D.C.). Of the five individuals who allegedly made exculpatory statements, one testified for petitioners, another two testified for the government and the remaining two, who were called as witnesses by the government but did not testify, were employees of petitioners (Tr. Vol. III 621, Vol. IV 881, 966, Vol. V 1335, 1336; Affidavit of Robert Hamman and Howard VanderZyl attached to petitioners' motion for new trial).[1]

It is therefore respectfully submitted that the petion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

---

[1] "Tr." refers to the six-volume trial transcript which we are lodging with the Clerk. We are also lodging with the Clerk a copy of petitioners' motion for a new trial.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 476551 163